IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 18054/2004

COMMISSIONER OF SALES TAX ...Petitioner through
Mr. M.K. Aurora, Adv.

Versus

JAGANNATH DUDADHAR ...Respondent through
Mr. Randhir Chawla
with Mr. Abhar E.,
Advs. for Respondent
No.2

Date of Hearing : 12th January, 2007

WITH

W.P.(C) 11487/2005

JAGANNATH DUDADHAR ...Petitioner through
Mr. Randhir Chawla
with Mr. Abhar E., Advs.

Versus

THE SALES TAX OFFICER ...Respondent through
Mr. M.K. Aurora, Adv.

Date of Hearing : February 15, 2007

Date of Decision : February 26, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE J.P. SINGH

1. Whether reporters of local papers may be allowed to see the Judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the Judgment should be reported in the Digest? Yes

J U D G M E N T

1. The Commissioner of Sales Tax (hereinafter referred to as the 'Department' for the sake of brevity) has filed CWP No.18054/2004 under Articles 226/227 of the Constitution of India challenging the Orders dated 13.5.2004, 1.10.2004 and 14.10.2004 passed by the Appellate Tribunal, Sales Tax in which the Department had been directed to issue statutory Declaration Forms to the Respondent Jagannath **Dudadhar**. The Appellate Tribunal, Sales Tax, had also declined the Department's request to stay the operation of its Order during the pendency of the Reference under Section 45 of the Delhi Sales Tax Act, 1975 (DST Act for short). This Court has, time and again, disapproved the impleadment of Tribunals or any other Authority functioning in a judicial or quasi judicial capacity. Accordingly, we have *suo moto* struck off the Appellate Tribunal, Sales Tax, New Delhi from the array of Parties.

2. On 7.8.2003 **Dudadhar** applied for issuance of statutory Declaration Forms for the Assessment Years (AYs) 2001-2002 and 2002-2003 under the DST Act and Central Sales Tax Act, 1956 ('CST Act' for short) aggregating Rs.67,73,26,240/- stated to be

involving a sales tax revenue of over Rs.13.3 crores. On 9.9.2003 the Sales Tax Officer (STO) issued a Deficiency Memo predicated on various demands remaining outstanding against **Dudahdar** in respect of the AYs 1989-1990 to 1993-1994, 1998-1999, 2000-2001 and 2001-2002 and for the wrong utilisation of Declaration Forms already supplied to it. The Department proposed furnishing of additional surety and for withholding issuance of Declaration Forms under the provisions of Rule 8(4)(c)(ii) of the DST Rules, 1975. On 17.10.2003 the STO rejected the applications of **Dudadhar** for issuance of the statutory Declaration Forms. On 23.1.2004 **Dudadhar** filed Appeals against the said Orders dated 17.10.2003. On 6.4.2004 the Assistant Commissioner (Appeals) - VII, Sales Tax, dismissed these Appeals and confirmed the Order of the STO observing inter alia that **Dudadhar** had made claims of sales to registered dealers who were either found not to be functional or to be non-existent; and because the majority of the claims for exemption were found not to be genuine. On 15.4.2004 this Order was assailed before the Appellate Tribunal, Sales Tax and these Appeals were accepted on 13.5.2004. The Tribunal, inter alia, held that the surety provisions applicable to the proper use and custody of ST-I could not be applied to the grant or refusal of ST-

35 and ST-35/1 Forms in the absence of specific provision under Section 18 of the DST Act. Rectification/Review application under Section 48 of the DST Act was filed by the Department which was rejected by Orders dated 26.5.2004. After the filing of and the subsequent withdrawal of WP(C) No.9879/2004 a Reference under Section 45 of the DST Act was initiated by the Department on 5.6.2004. On 5.8.2004 another application for Rectification under Section 48 of the DST Act of the Order dated 13.5.2004 was initiated which came to be dismissed by Orders dated 20.8.2004. It appears that four questions are awaiting final adjudication by this Court in the pending Reference. On 6.10.2004 the Appellate Tribunal disposed of the Department's application for stay of the operation of the Order dated 13.5.2004 by requiring **Dudadhar** to furnish Securities amounting to Rs.60,00,000/- in the form of Bank Guarantees. A week later, on 14.10.2004, the preceding Order dated 6.10.2004 stipulating security in the form of Bank Guarantees was modified to require the furnishing of a Surety instead, even in the face of the Department's vehement opposition. It is in these circumstances that WP(C) No.18054/2004 has been initiated.

3. CWP No.11487/2005 has been filed by **Dudadhar** invoking Articles 226/227 of the Constitution of India for mandating the Respondents to rectify two Declaration Forms in ST-35/1 or issue fresh Declarations in lieu thereof in conformity with the provisions of the DST Act and the Rules framed thereunder. As already adumbrated, on 10.9.2001, the Petitioner had applied to the Department for the supply of five Declaration ST-35/1 Forms to be issued to Bharat Petroleum Corporation Ltd. (BPCL). Consequent upon its request being turned down **Dudadhar** filed CWP No.6976/2001 which was disposed of by Orders dated 21.11.2001. The concerned STO had submitted to the Court that a fresh speaking Order would be passed. On 22.12.2001 the STO called upon **Dudadhar** to furnish a surety for Rs.50,00,000/- and Rs.10,00,000/- under the Local and Central Acts respectively, which were duly furnished. While on this aspect of the dispute it may be mentioned, as submitted by Mr. Aurora, learned counsel for the Department, that a surety produced by **Dudahdar** came to be withdrawn because the surety/Jainsons had stated that its signatures on the Deed had been forged. This event should not be lost sight of since the interests of the State in collection of sales tax should not be put to peril. Thereupon, on 24.12.2001, the STO issued five Declaration Forms in ST-35/1 in respect of

transactions with BPCL but specifically restricting their user to AY 2001-02. Three of these Declaration Forms were issued to BPCL for supplies made during 2001-2002 and the remaining two Declaration Forms were issued to BPCL for supplies made during 2002-2003. On 29.3.2004 the STO rejected the two Declaration Forms while framing the assessment of BPCL for the AY 2002-2003 and created Sales Tax demands against BPCL for these transactions. It is undisputed that recovery of the sales tax from BPCL has been effected. BPCL had filed an Appeal against this assessment, in the course of which it had been directed to make a pre-deposit, which Orders had been assailed by BPCL by means of another writ petition. It was in these circumstances that **Dudadhar** had requested the STO to rectify or validate the two Declaration Forms unauthorisedly used by it during 2002-2003. This request having not been acceded to by the STO has occasioned the filing of CWP No.11487/2005. It is admitted that **Dudadhar** had unilaterally scored out the 'AY 2001-2002' and instead written 'AY 2002-2003' on two of the five Declaration Forms supplied to it. The Department has also made a grievance of the fact that **Dudadhar** attempted to illegally use these two Declaration Forms ST-35/1 as ST-35 Forms.

4. In ***Prince Plastics*** *& Chemical Industries -vs- Commissioner of Sales Tax*, [2003] 131 STR 372 and ***S.N.E. (India) Pvt. Ltd.*** *-vs- Commissioner of Sales Tax*, [2003] 131 STR 417 another Division Bench had the occasion to cogitate upon the various aspects of ST-1 Declaration Forms, from the standpoint of selling dealers and also purchasing dealers. In ***Prince Plastics*** the registered dealers had sold goods without charging sales tax allegedly on the false assurance that Declaration Forms would be furnished. It was contended by those Petitioners that predicated purely on their status as registered dealers, they were entitled to exemption from payment of sales tax and that, therefore, Rule 8 (4)(c) of the DST Rules was ultra vires the DST Act. The Division Bench underscored that the charging section of the DST Act does not prohibit either multiple taxation or multi-point taxation, but on the contrary envisages it; that the intent behind the devising of the "C" Forms or "ST-1" Forms is to avoid multi-point taxation; that Declaration Forms enable a dealer to pass on the burden of sales tax in such a fashion that it ultimately reaches the buyer-consumer; that none of the provisions of the Act postulate that all sales to registered dealers *per se* qualify for deductions; that the penultimate of the three provisos to Section 4(2)(a) of the DST Act declares that no deduction in respect of any sale referred to

in sub-section(v) shall be allowed unless a true declaration in the prescribed form duly filled and signed by the dealer is furnished; that there is no foundation for the argument that the selling dealer cannot charge sales tax where the purchasing dealer does not simultaneously furnish ST-1 forms; that even if the purchasing dealer has applied for ST-1 forms but has not received them for any reason, the selling dealer is not automatically exonerated from the statutory duty to collect sales tax; that it is not uncommon for dealers to renege on their commitment to supply ST-1 forms or for the Department to decline to supply these forms to them because of their falling in arrears of payment of tax; that the State does not forfeit its rights and entitlement to collect sales tax; that the dealer who has mistakenly chosen to trust another dealer for supply of Declaration Forms must suffer for his mercantile recklessness; that selling dealers have the remedy of filing suits against the purchasing dealers for the recovery of money, i.e. the sales tax component which has to be paid to the State by it because of the failure or inability or plain refusal of the purchasing dealer to forward the requisite Declaration Forms. Rule 8(4)(c) of the DST Rules was held to be intra vires Section 4(2)(a)(v) of the DST Act.

5. In ***Prince Plastics*** the Division Bench had by means of the common Judgments decided writ petitions filed by other dealers including Messrs Simran Engineering Works, Messrs Swastik Industrial Power Lines and Messrs National Products, who thereafter filed Appeals before the Supreme Court numbered as Appeal Civil 314/2003, 315/2003 and 308/2003 respectively. ***S.N.E. (India) Pvt. Ltd.*** similarly also assailed the Division Bench Judgment against it by filing a Special Leave Petition bearing No.313 of 2003. Meanwhile, the Department, on the other hand had already filed Appeals Civil 1717-1719/1999 against the Division Bench Judgment dated November 30, 1998 reported as ***Shri Krishna Engg. Co.*** -vs- Commissioner of Sales Tax, Delhi, [2003] 131 STC 321, which according to counsel had preferred a different view. All these Appeals came to be decided by the Apex Court as *Commissioner of Sales Tax, Delhi -vs-* ***Shri Krishna*** *Engg. Co.*, AIR 2005 SC 958. We have laboured to give these details since it is not readily forthcoming and obvious from the Judgment of their Lordship that the enunciation of the law made by the Division Bench of this Court in ***Prince Plastics*** and ***S.N.E. (India) Pvt. Ltd.*** had been affirmed, and that expressed by the Division Bench of this Court in ***Shri Krishna Engg. Co.*** came to be rejected.

6. In ***Shri Krishna*** the Supreme Court upheld the ratio of ***Prince Plastics*** (which also decided *Simran Engineering Works*) in these words:-

> *38.* It is the contention of the selling/purchasing dealers that selling dealers are made to suffer the consequences of failures and defaults on the part of the purchasing dealers in which they have played no part whatsoever, they are in hapless position and would be compelled to incur Sales Tax liability for events which are not within their control and that Rule 8(4)(c) travels beyond the ambit of Section 4(2)(a)(v) of the Act. A Division Bench of the Delhi High Court, by their judgment dated 12-7-2002, which is impugned in these civil appeals dismissed the challenge in regard to the vires of Rule 8(4)(c).
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> 39. We have carefully gone through the judgment of the Division Bench in Simran Engineering Works etc. The reasoning given by the Bench in rejecting the challenge in regard to the vires of Rule 8(4)(c) are very sound. As rightly pointed out by the Division Bench, the Sales Tax Department is neither privy to nor is it concerned with any assurances that might have been exchanged inter se between the selling and purchasing dealers in the matter of furnishing ST-1 Forms. There is no reason for the consequences of the dealers acts of omission or commission to visit the Department. The Act and the Rules do not prohibit the simultaneous furnishing of ST-1 Forms, they, in fact,

envisage it. Supply of ST-1 Forms by the Department under the Rules is an advance, however, the actual practice may be different (para 7 onwards of page 36 of the judgment).

40. In our opinion, the generality of the provision of Section 71(1) should be given its full effect so as to enable the making of Rules for the full implementation of any provisions of the Act. The impugned rule also gives effect to Section 43(5) of the Act which deals with appeals and contains the requirement of pre-deposit of tax and penalty. Other situations where the Commissioner has the discretion to cancel the dealers registration for failure to pay tax including penalty, furnishing a false declaration etc. which must be borne in mind while considering the sweep of Section 71(1) of the Act. Thus, the primary intendment of the Act is to levy and collect tax and every devise, including of stipulations pertaining to the dealer friendly declaration Forms are incorporated to implement the objective of the Act itself as pointed out by the High Court they cannot be conceived as ultra vires the statute (pages 63-64 of the judgment).

.....

42. We are of the opinion that the judgment and order of the High Court in Shri Krishna Engineering Co. case (CWP 3304 of 1997) is passed on a misconstruction of the clear statutory provisions contained in Sections 4, 71(1), 71(2)(b) and (s) of the Delhi Sales Tax Act, 1975 and that the High Court has also not appreciated the

> true scope of the rule-making power which has been conferred on the Lt. Governor of Delhi by Section 71 (1) of the Act which lays down that the administrator may make rules for carrying out the purposes of the Act. A general power has thus been conferred upon the administrator to make appropriate rules to carry out the purposes of the Act. The purpose of the Act is not just to fix liability but also to recover the liabilities which are so fixed. The High Court also has not noticed that Section 71(2)(s) of the Act which confers a residual power on the administrator to makes rules in respect of any other matter which is required to be or may be prescribed. We are, therefore, of the opinion that the impugned amendment was within the rule-making power of the Lt. Governor of Delhi under Section 71(2)(b) read in conjunction and harmoniously with Section 71(2)(s).

7. We should also briefly notice the decision of the Division Bench of the Patna High Court in *I.T.C. Limited -vs- State of Bihar*, [2004] 137 STC 15 which was pronounced one year prior to the authoritative ***Shri Krishna*** Judgment of the Supreme Court. The Bihar Finance Act, 1981 provided for the levy of tax on the sale and purchase of goods in Bihar. The Bench observed that any provision either under the Act or the Rules calculated to prevent evasion of tax on intra-state sales would be within the

power of the State Legislature, which could not, however, make any law with regard to inter-state sale or commerce or in the course of export. The Bench thereafter noted that the purpose behind carrying a Declaration Form is for verification and assessment of tax payable as well as for the prevention of evasion of tax. However, applying the ratio of *State of Bihar -vs- Harihar Prasad Debuka*, [1989] 73 STC 353 : (1989) 2 SCC 192 it was held that Declaration Forms do not prohibit inter-state transportation of goods but differentiate and distinguish unauthorised trade or business to which freedom of trade and commerce would not apply. Such Declaration Forms would not affect the freedom of movement of goods throughout the country. On the contrary it would promote such movement as it would have the effect of distinguishing goods that would be transported across the territory of the State from those which would reach the consumption point within the State. The other point that was decided by the Division Bench was that insistence on payment of admitted dues for grant of Declaration Forms can be justified on the ground that the authorities may decline their issuance wherever admitted dues had not been deposited. However, refusal to issue Declaration Forms predicated on the non-deposit of disputed amount would be unjustified. In this context it should

be recalled that in *Dawar Brothers -vs- State of Madhya Pradesh*, [1979] 44 STC 286 the Division Bench of the Madhya Pradesh High Court had opined that the rule-making powers of the State Government under Section 13 (3) and (4) of the Central Act cannot be employed by it as a device for the realisation of its own dues under the State Act. Reliance had been placed on *Khemka & Co.(Agencies) Pvt. Ltd. -vs- State of Maharashtra*, [1975] 35 STC 571: AIR 1975 SC 1549 where it was held that dues under the Central Act should be differentiated from those arising out of the State Act and that the powers and penalties contained in the Central Act cannot be extrapolated into the State Acts. The essence of all these Judgments, therefore, is that the objective of a State statute should ordinarily not extend to the recovery of dues under a Central Act.

8. However, the Division Bench of this Court in *Gupta Trading Co. -vs- Delhi Administration,* [1986] 62 STC 7 had clarified that sales ought not to be looked at in isolation as they were an integral part of the overall business activity of the dealer; that the clandestine disposal of goods to the detriment of sales tax collection could not be overlooked and preventive steps to preserve the Department's interests could be adopted. It was

held that “Rule 8(4)(c) also permits the assessing authority to withhold the issue of ST-1 form for reasons to be recorded in writing, in case default in furnishing any return together with documents, etc. Discovery of adverse material suggesting any concealment of sale or purchase or furnishing inadequate particulars in the return may also result in disentitlement of such forms”. We prefer this analysis of law since laxity in approach inexorably enables the retention by the dealer of sales tax that has already been collected from the ultimate customer or consumer.

9. Mr. Randhir Chawla, learned counsel for **Dudadhar** has not brought to our notice any decision to the effect that if a dealer is in arrears of tax or defaults in depositing the admitted tax dues so far as the State statute is concerned, the Department must nevertheless issue Declaration Forms pertaining to inter-state transactions. Having given careful consideration to the issue we are not persuaded to hold that even though a dealer is in default of payments of sales tax dues, the Department must issue Declaration Forms in respect of inter-state sales transactions. It seems to us that issuance of a Mandamus in these circumstances would be wholly inappropriate and a Writ Court would be fully

justified in declining to give succour to the defaulting party or to another party which has been reckless or sanguine in going through transactions without insisting that Declaration Forms be furnished to it or exemplifies recalcitrance in depositing State dues.

10. In the backdrop of this legal analysis we shall now take up in detail the facts of the present case. Mr. Randhir Chawla, learned counsel for **Dudadhar** contends that the present dispute has already attracted the attention of this Court, yet the Department devises one stratagem or another to deny actual and consequential relief to it. **Dudadhar** had filed CW 2107/1997 which was allowed by the Division Bench vide Orders dated 28.5.1997, noticing, inter alia, that the Department had incorrectly taken into account dues of Rs.29,58,446/- in respect of AY 1986-1987 although this amount had been stayed and therefore there was no justification for the refusal to issue Declaration Forms. Our attention has thereafter been drawn to the Orders dated 21-11-2001 by which this Court had disposed of **Dudadhar's** writ petition CW 6976/2001. The STO was present in Court at that hearing and had undertaken to pass a fresh order after hearing the Petitioners. Pursuant to this undertaking the

following Orders dated 22.12.2001 were passed, which according to Mr. Chawla finally and firmly settle the issues between the parties, operating, as it must, as *res judicata*. Therefore, he contends that upto the AY 2001-2002 the Department cannot require furnishing of any surety beyond Rs. 50 lacs under the DST Act and Rs.10 Lacs under the CST Act. The Order reads thus:-

OFFICE OF THE COMMISSIONER OF SALES TAX

WARD NO.64

No. Dated

Speaking Order in r/o issue of declaration forms to Jagannath Dudadhar

Jagannath Dudadhar has applied for issuance of 5 advance 'C' forms on 10.9.01 for the year 2001-2002 in which the dealer was asked to file bank guarantee of rupees one crore. The dealer further applied for these forms on 19.11.01.

ST35-2-98-99	1169581
ST35-9-2000-01	8923408
C Form 1-98-99	28932392
ST35/1-5 2001-02	Advance

It was mentioned on these applications that deficiency memo already issued on 10.9.01 and these application clubbed together with earlier application.

The dealer challenged the deficiency memo in the Hon'ble High Court. The Hon'ble High Court has quashed the deficiency memo and directed the

undersigned to pass speaking order in this case.

Without prejudice of anything the status of the case is as under:

The dealer was assessed for the year 1997-98 creating a demand of Rs.65845299/- under Local Act and Rs.2919304 under Central Act. The demand was raised due to the rejection of the sale version of the dealer under the Local Act as well as under the Central Act. The dealer has filed an appeal before the first appellate authority and went to High Court vide CWP No.6808/2001 for stay of the demand. The stay was granted by the Hon'ble High Court subject to filing of a surety of Rs.60 lacs and a cash deposit of Rs.12 lacs. The dealer has sent C portion of bank challan of this amount and filed surety of Rs.60 lacs for confirmation.

The dealer was assessed for 1998-99 creating a demand of Rs.171206276/- under Local Act and Rs.867820/- under Central Act. The dealer has filed appeal against this demand alongwith stay application before the first appellate authority and the same is pending with the first appellant authority. The basis of the demand created was similar to the year 1997-98.

The dealer has already obtained 21 'C' forms 30 ST1 forms 128 ST35 forms and 927 ST 35/1 forms for the year 1999-2000 involving a purchase of Rs.25-30 crores and involving crores of tax on these forms.

Again dealer obtained 100 ST 35/1/-Rs.220194747

14 C forms for Rs. 57205693

Total	Rs.277400440

For the year 2000-01 involving purchase of 27.74 crores and a tax effect of Rs.5-6 crores. The assessment of the dealer is being framed by the Enforcement branch of the Sales Tax Deptt. The sales conducted by the dealer under the local act as well as under the Central act for the year 1997-98 cross verified by a team of the Enforcement branch of the sales tax department. It was found by the team that the purchasing dealers to whom the sales was shown were not in existence and their R/c's cancelled and the 90% of the sales shown to these regd. dealers was not genuine. The firm Jagannath Dudadhar obtained advance ST 35/1 forms from the deptt. and show his 90% sales to such dealers on forms ST 35 and the govt. losses revenue on these forms issued to the dealer in crores.

Similarly a team of the Enforcement staff was sent to cross verify the interstate sale of the dealer for the year 1997-98 to the various cities of the Rajasthan and it was reported by the visiting team that all the dealers were not in existence and the forms submitted by the dealers already declared obsolete by the Commissioner commercial tax deptt. Jaipur (Rajasthan) in some case even the forms were not issued to those dealers by the deptt.

Dealer was confronted with all these observations and his reply was mainly that he is being harassed by the department and all the process is being done to withhold the issuance of forms to him. He has obtained stay from

the Hon'ble High Court for the year 1997-98. He has filed appeal before the first appellate authority alongwith stay application for the year 1998-99. All his sale are genuine and he is being harassed by the deptt. for malafide purpose.

As regarding the new inserted of the third proviso of Delhi Sales Tax Rules vide 8(4) c for obtaining blank declaration forms in respect of transactions already finalised in the past a dealer is required to submit a requisition a/c. in Form ST2A (for local form) and form 2A for central form alongwith his last return of the corresponding assessment year. The dealer has filed his requirement for ST 35-9 for different amount for the year 2000-01. As regarding submission of ST 2B and 2B alongwith quarterly returns in case of advance forms the same has been submitted at the time of the application for issue of forms.

In his reply the dealer has explained that rejection of sale version is no where mentioned in rule 8 which governs the issue of forms. It is to be explained that as per rule 8(4)c(iii) elaborates a dealer found by an appropriate assessing authority having some adverse material against him suggesting any concealment of sale or purchase or of furnishing inaccurate particulars in the returns. Therefore the adverse material is also important in issuance of forms i.e. sale should be genuine of the dealer to whom forms are to be issued.

In the light of above observations as the dealer has been directed by the Hon'ble High Court to file 60 lacs surety

and 12 lacs cash deposit while granting stay for the year 1997-98 and the demand of 1998-99 two and half times the demand of 1997-98 and the forms for the year 1999-2000 and 2000-2001 already received by the dealer. The dealer has applied for 5 advance 'C' forms in which he can make purchases of crores of Rs. from 5 different dealers during the year 2001-02. The dealer has also applied for advance 35/1 forms for local purchase. The dealer after making the purchases through these forms manipulates his sales (90% of which are not genuine) and depositing tax on a minor amount of sales.

In the light of above observation to safeguard the government exchequer I hereby direct the dealer to file a surety of Rs.50 lacs under the Local Act and 10 lacs under the Central Act. (highlighting added)

11. In respect of AY 2002-2003 an Assessment Order was passed, the salient extract of which reads as follows:

The dealer has made purchases worth Rs.22,67,28,668/- from B.P.C. Ltd., the Principal, during the year on the strength of ST-35/1 forms in his capacity as sole selling agent and has sold these goods in the course of local sale barring the tax paid sales for a sum of Rs.25.57 crores appx. The dealer has argued that he is not liable to pay tax on purchase from BPCL since he has not been issued ST-35 or ST-35/1 forms. He has therefore argued that these purchases shown against ST-35 and ST-35/1 forms may be treated as tax paid

purchases. The dealer plea is not tenable since he has filed requisition of these forms on his own and had also filed the application for obtaining these forms from the ward. The application was however rejected but the dealer preferred an appeal against these orders of rejection. Furthermore the dealer has not filed any proof of payment of tax on these purchases to the seller and hence these purchases cannot be taken as tax paid purchases.

The dealer has shown RD sales for a sum of Rs.22,74,56,360/-. These sales barring sales worth Rs.16,59,40,405/- shown made to M/s. Vigyan Udyog Corp., 20, G.F., Bagichi Madho Dass, Near Red Fort, Delhi LC No./14/073392/0383 were found verified from DMI, hence the credit is allowed. As regards sales shown made to M/s. Vigyan Udyog Corp., the dealer has furnished 34 ST-35 forms none of which contain the validity stamp for the year for which these have been issued by the ward to the purchasing dealer. Inquiries made from ward-14 have revealed that these forms were among the last issued forms on 12.04.90. RC's of the firm have been cancelled w.e.f. 29.09.03. There are diversified items allowed to the dealer in his RC's and no forms have been issued to him since 12.04.90.

Sensing the dubious activities of the purchasing dealer and connivance between selling and purchasing dealers, notices were sent to M/s. Vigyan Udyog Corp. at the last available business premises address as well as at the available residential address of the proprietor Shri

Madan Lal Sharma. While the notices sent at the residential address have been received back from postal authority with the remarks STI of the ward has reported that the firm was not found functioning at the quoted business premises. Therefore, the transaction are imaginary and not straightforward. The dealer has tried to avoid payment of tax by covering such huge transaction of local cash sales by statutory forms of non functioning firm without authority by the ward officer for specific year. Further, the said purchasing firm has not filed any return for the assessment year 2002-2003. Whatever quarterly returns filed by that dealer during 1999-2000 to 2001-2002 also shown nil GTO during these qtrs. As such, the said purchasing dealer has not functioned at least w.e.f. April, 1999. Therefore, these transactions shall be taxed @ 20%. The dealer could not file ST-35 for Rs.66,42,792/- to be taxed @ 20% under the Local Act.

The assessment of the dealer is framed as under :-

G.T.O.	:	88,36,45,045.00
ISS	:	14,69,27,862.00
Tax Paid Sale	:	5,23,59,953.00
RD Sale	:	5,48,73,163.00
Taxable @ 4%	:	2,48,41,690.00
@ 8%	:	986.00
@ 12%	:	19,44,695.00
@ 20%	:	60,26,96,696.00
@ 8%	:	1,25,000.00(Sold Plant & Machinery

and Generator)

Tax Assessed	:12,17,76,449.00
Tax Paid	: 15,34,886.00
Tax Due	:12,02,41,563.00
Interest	: 3,24,62,522.00
Penalty	: 10,00,000.00
Total Tax Due	:15,37,04,085.00

Thus, the dealer is directed to pay a sum of Rs.15,37,04,085/- in terms of demand notice enclosed.

Keeping these details in perspective we are not convinced that the conclusion of the Department that **Dudadhar's** dealings with alleged dealers is in consonance with the statute. Prima facie, there is sufficient substance available with the Department that supply of Declaration Forms may jeopardise the collection of sales tax from **Dudadhar**. When this is combined with the withdrawal of a surety previously provided by **Dudadhar**, the action of the Department is further strengthened. When the volume of litigation prompted by **Dudadhar** is viewed, the Department's decision not to supply Declaration Forms or revalidate the two Declaration Forms already supplied can scarcely be seen as obdurate or unreasonable.

12. In ***Prince Plastics*** the Court had to consider the propriety of insistence on compliance with certain conditions as a pre-

requisite for entertaining an Appeal. It observed as follows:-

> 25. Despite having a good case a party may receive an unfavourable order/judgment. It may then not only suffer the discomfort of taking steps to have the order corrected in appeal, but may additionally have to comply with onerous pre-conditions for the hearing of the appeal. In Shyam Kishore -vs- Municipal Corporation of Delhi, (1993) 1 SCC 22, somewhat, similar pre-conditions for the disposal of an appeal against an assessment order had come up for consideration before the honourable Supreme Court. Under the MCD Act an appeal against the assessment cannot be heard without pre-deposit of the tax. It was held that the appellate authority has no jurisdiction to waive the condition of deposit or stay the collection of tax pending disposal of the appeal. The Apex Court also relied that despite these stringent requirements, the remedy of an appeal was nonetheless an alternative remedy thereby discouraging the invocation of extraordinary powers of the High Court under Articles 226 and 227 of the Constitution. As we have already mentioned, the impugned Rules merely implement this settled principle of law. In Shyam Kishore the plea that the provision for deposit of duty or penalty pending appeal whittles down the appellant's right of appeal and is, therefore, *ultra vires* did not find favour with the honourable Supreme Court. The Court relied on its previous observations in Vijay Prakash D. Mehta -vs- Collector of Customs (Preventive), Bombay [1989] 72 STC 324(SC) : (1988) 4 SCC 402, viz., “right to appeal is

neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant". This position was once again reiterated in *Gujarat Agro Industries Co. Ltd. -vs- Municipal Corporation of the City of Ahmedabad,* AIR 1999 SC 1818. It was again articulated in *State of Haryana -vs- Maruti Udyog Ltd.,* [2001] 124 STC 285(SC) : AIR 2000 SC 2941 in the syntax of sales tax legislation, in these words:

> "There cannot be any dispute that right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the error of the court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law. Sub-section (5) of section 39 of the Act vests a discretion in the appellate authority to entertain the appeal if it is filed within sixty days and the amount of tax assessed along with penalty and interest, if any, recoverable from the persons has been paid. The aforesaid restriction is subject to the proviso conferring discretion upon the appellate authority to dispense with the deposit of the amount only on proof of the fact that the appellant was unable to pay the amount. Before deciding the appeal, the appellate

> authority affords an opportunity to the party concerned to either pay the amount or make out a case for the stay in terms of proviso to sub-section (5) of section 39 of the Act. Once the conditions specified under sub-section (5) of section 39 are complied with, the appeal is born for being disposed of on merits after hearing both the sides".
>
> This dicta is not confined only to taxation matters and applies with equal force even to civil appeals, as would be obvious on a reading of the decision in *Kondiba Dagadu Kadam -vs- Savitribai Sopan Gujar*, AIR 1999 SC 2213.

13. **Dudadhar** had also filed CW 8392/2002 in this Court titled *Jagannath Dudadhar -vs- Commissioner of Sales Tax* which was decided by Judgment dated 25.2.2003 reported as [2004] 136 STC 235. After rejecting the plea for total waiver of pre-deposit on the reasoning that the Legislature is competent to circumscribe the right of an appeal including the terms spelt out in Section 43(5) of the DST Act, the proviso to sub-section (5) was invoked by the Division Bench which accordingly permitted the credits in the sum of Rs.46,50,000/- stated to be due to **Dudadhar**, to be deducted from the pre-deposit of Rs.5,08,40,000/- against the assessed demand of Rs.12,67,50,068/- for AYs 1998-1999(L), 1998-1999 (C) and 1999-

2000(L). The occasion for the writ petition was because the Additional Commissioner(Appeals) had directed **Dudadhar** to deposit 25 per cent of disputed tax and penalty as a condition precedent for entertaining the Appeal.

14. Meanwhile, in Appeal No.628/STT/92-93 the Sales Tax Tribunal, Delhi reduced the surety amount from Rs.2,00,00,000/- to Rs.15,00,000/- vide Orders dated 18.3.1993. It would be relevant to recall that one of the sureties had withdrawn from this engagement on the ground that the Signatory of the Surety was not competent to bind the HUF. Even from this brief narration it will be evident that whilst a labyrinth of litigation has been laid out by **Dudadhar**, it nevertheless insists on furnishing of Declaration Forms by the Department. The right of the State or Department for collection of sales tax has thus been complicatedly imperilled. In our view as a party ascends the hierarchy of appeals, the prospects of its success correspondingly becomes slender. Therefore, such a party should ordinarily be required to deposit the demand of tax. Governments cannot function on promises to pay, or on sureties, or bank guarantees. See *Assistant Collector of Central Excise, Chandan Nagar, West Bengal -vs- Dunlop India Ltd.*, AIR 1985 SC 330, the relevant

portion of which reads as follows:-

> 7. Now coming to the facts of the present case, the respondent, Dunlop India Limited is a manufacturer of tyres tubes and various other rubber products. By a notification dated April 6, 1984 issued by the Government of India, Ministry of Finance (Department of Revenue) in exercise of the powers conferred by R.8(1) of the Central Excise Rules, 1944, tyres, falling under Item No.16 of the First Schedule to the Central Excise and Salt Act, 1944, were exempt from certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications. The Department was of the view that the Company was not entitled to the exemption as it has cleared the goods earlier without paying central excise duty, but on furnishing Bank Guarantees under various interim orders of courts. The Company claimed the benefit of the exemption to the tune of Rs.6.05 crores and filed a writ petition in the Calcutta High Court and sought an interim order restraining the central excise authorities from the levy and collection of excise duty. The learned Single Judge took the view that a prima facie case had been made out in favour of the Company and by an interim order allowed the benefit of the exemption to the tune of Rs.two crores ninety three lakhs and eighty five thousand for which amount the company was directed to furnish a Bank Guarantee, that is to say, the goods were directed to be released

on the Bank Guarantee being furnished. An appeal was preferred by the Assistant Collector of Central Excise under clause 10 of the Letters Patent and a Division Bench of the Calcutta High Court confirmed the order of the learned single judge, but made a slight modification in that the Collector of Central Excise was given the liberty to encash 30% of the Bank Guarantee. The Assistant Collector of Central Excise has preferred this appeal by special leave. By our interim order dated Nov.15, 1984, we vacated the orders granted by the learned single judge as well as by the Division Bench. We gave two weeks' time to the respondent Company to file a counter. No counter has, however, been filed. Shri F.S. Nariman, learned counsel, however appeared for the respondent. We do not have the slightest doubt that the orders of the learned single judge as well as Division Bench are wholly unsustainable and should never have been made. Even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-Company. The balance of convenience was certainly in favour of the Government of India. Governments are not run on mere Bank Guarantees. We notice that very often some courts act as if furnishing a Bank Guarantee would meet the ends of justice. No governmental business or for that matter

> no business of any kind can be run on mere Bank Guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking. The appeal is allowed with costs.

These views are also to be found in *Siliguri Municipality -vs- Amalendu Das*, AIR 1984 SC 653; *State of Madhya Pradesh -vs- M/s. M. Vyavsaya & Co.,* AIR 1997 SC 993 and *Upadhyay & Co. -vs- State of U.P.,* (1999) 1 SCC 81.

15. The conundrum which presents itself is whether this Court should exercise its extraordinary powers under Article 226 of the Constitution of India in these circumstances. It will be recalled that the Department had furnished five (5) ST-35/1 Declaration Forms to the Petitioners in connection with its transactions with BPCL, only three of which were used during the period of their

currency/validity. However, the remaining two Forms were unauthorisedly used by **Dudadhar** in the subsequent Assessment Year and, therefore, were not recognised by the Department. The conduct of **Dudadhar** in these circumstances is contrived and cunning as will be manifestly evident from the following chronology. On 19.11.2001 it applied for five ST-35/1 Declaration Forms which were supplied on 24.12.2001, specifically indicating that these were in respect of transactions with BPCL in AY 2001-2002. The Petitioner was fully aware of this stipulation or restriction. On 9.9.2003 a Deficiency Memo was issued pursuant to **Dudadhar's** application for issuance of Statutory Form for the AYs 2001-2002 and 2002-2003. By Rejection Order dated 17.10.2003 the Department refused to issue Statutory Forms for the AYs 2001-2002 and 2002-2003 which included the transactions covered by the misutilised two Declaration Forms in question. These relevant facts have been suppressed in the Writ Petition. After the Rejection Order, on 27.3.2004, the Petitioner used the remaining two Declaration Forms [which were authorised to be used in AY 2001-2002 only] in relation to transactions in the subsequent Assessment Year. By this time **Dudadhar** had knowledge of the fact that the Department had taken a decision not to supply Declaration Forms. It was quite

logical and, therefore, only to be expected that when these two Declaration Forms were attempted to be used by BPCL for seeking exemption, they would be rejected by the Department. This is precisely what transpired on 29.3.2004. Accordingly, BPCL deposited the sales tax for transactions sought to be covered by these two Declaration Forms. Mr. Aurora has stated that **Dudadhar** had further violated the law by attempting to use the said two ST-35/1 Declaration Forms as ST-35 Forms.

16. In these circumstances we find no merit in the contention of Mr. Chawla that **Dudadhar** should have been put to prior notice of the Department's decision to withdraw the efficacy of the said two Declaration Forms. It is our opinion that there is no violation of the principles of natural justice since **Dudadhar** had knowledge of the fact that these two Declaration Forms were to be used only for transactions in AY 2001-2002. A party seeking equity must not transgress equity. There is merit in the contention of Mr. Aurora that the proper course for **Dudadhar** to have pursued was to surrender the two unutilised ST-35/1 Forms and instead ask for their substitution or their revalidation, prior to their user contrary to the express terms in which they were issued to **Dudadhar**. We cannot accept the contention of Mr.

Chawla that a party is automatically and absolutely entitled to Declaration Forms if it enters into a transaction with a registered dealer. We need do no more than refer to the ratio of ***Prince Plastics***. We are further unable to locate any bonafides in the manner in which **Dudadhar** has used the subject two ST-35 Declaration Forms. Even assuming that Declaration Forms are supplied for intended purchases, i.e. for transactions to be completed in the future, there is no legal impropriety for the Department to fix a period within which the Declaration Forms must be used. Rule 8(2) of the DST Rules contemplates that a selling dealer should not accept ST-1 Forms that have been declared as invalid or obsolete by the Commissioner. Whilst invalidity may be the consequence of various factors, obsolescence is related entirely to time. The Concise Oxford English Dictionary defines obsolete as -'no longer produced or used; out of date'. Administrative exigencies may, therefore, reasonably require the Department to lay down the periodicity within which Declaration Forms must be used. Such stipulation would normally not cause any prejudice to the dealer who can always apply for fresh and current Declaration Forms by surrendering obsolete or outdated ones. In the case in hand, **Dudadhar** has taken law into its own hands by attempting to use

Declaration Forms ST-35/1 against their tenor by tampering and interpolation. The consequence was that although BPCL has challenged the refusal, it has deposited the sales tax which it would have ordinarily charged from **Dudadhar** in the absence of valid Declaration Forms. In similar fashion, in the absence of Declaration Forms, **Dudadhar** can make further sales provided it charges and recovers sales tax on these transactions. The amount of tax paid would eventually be deductible or adjustable from the tax collected from the consumer. **Dudadhar** is the distributor of BPCL and further sells the petroleum products to retailers who directly collect taxes from the consumer on each sale. These sales tax collections by the retailers are made by them on behalf of the State and in no circumstances are they entitled to retain them. Accordingly, if the distributor, namely **Dudadhar**, insists on payments of sales tax from the retailers, the latter having already recovered these amounts from the consumer, no party would be put to financial loss. These factors should not be ignored since by not adhering to this procedure, there is the foreboding likelihood of the collection and receipt by the State of sales tax being severely jeopardised.

17. It may be recalled that the vires of Rule 8 of the DST Rules, 1975 had been assailed in CW 3304/1997 titled Shri Krishna Engineering Co. -vs- CST but the vires eventually came to be upheld by the Apex Court in ***Shri Krishna***. That apart, we must highlight the changes incorporated by Notification dated 11.2.1997 bearing No.F.4(36)/96-Fin.(G) into Rule 8(4)(c)(ii) whereby the words “which the appellant admits to be due from him and which is not in dispute” were replaced by the words “in respect of which no order for installments or stay have been obtained from the competent authority under the provisions of law.”

18. The Commissioner of Sales Tax filed CWP 9879/2004 which, on 20.7.2004, was dismissed as withdrawn with liberty granted to file a Reference under Section 45 of the DST Act. The Reference 1 & 2/STT/2004-05 was filed on 27.7.2004 as in respect of Tribunal's Order dated 13.5.2004. The Registrar, Sales Tax Appellate Tribunal has forwarded a Reference to this Court on 12.10.2004 in respect of Appeal 18-19/STT/04-05 pertaining to the issuance of statutory Declaration Forms (ST-35) for the AYs 2001-2002 and 2002-2003 and ST-35/1 Forms for 2002-2003. The Reference to this Court has been numbered as STR-06/2004.

However, in August, 2004 the Rectification Proceedings initiated by the CST against the Tribunal's Order dated 13.5.2004 were filed and dismissed. Mr. Chawla has contended that the Department has raised the same relief in several judicial proceedings initiated by it, which the Department is not permissible in law. Mr. Aurora has immediately conceded that the prayer made in CWP 18054/2004 seeking quashing of the Order dated 13.5.2004 passed by Respondent No.1 will not be pressed since this prayer stands covered by the first prayer in the Reference. He, however, has fervently pressed that the impugned Order dated 1.10.2004 granting conditional stay, and Order dated 14.10.2004 modifying the Order dated 1.10.2004 have become critical. It is in this complex and convoluted factual matrix that the Department has declined either to issue two Forms in lieu of ones already issued pertaining to AY 2002-2003, or to revalidate these Forms, leading to the filing of CWP 11487/2005 which also contains a prayer for restraining the Department from recovering sales tax dues vide Assessment Order under Section 23(3) of the DST Act.

19. The amendments to the DST Rules have already been adumbrated above. Prior to their amendment on 12.9.2001 they

envisaged and mandated depositing of the amount of tax assessed or the penalty imposed by the Assessing Authority which the appellant admitted to be due from him and which was not in dispute. After the amendment to the Rules, payment/deposit of the amount of tax assessed or the penalty imposed by the Assessing Authority is essential unless orders for installments thereon or for stay have been obtained from the Competent Authority. In other words, prior to 12.9.2001 an appellant was required only to pay or deposit the admitted tax, whereas, as the law presently stands, the amount of tax and penalty must be deposited as a pre-condition for the entertaining of the Appeal unless it has been stayed by the Competent Authority. Therefore, the Department would be justified in adopting a different stand post 12.9.2001, namely, that it is now an irrelevant consideration whether the Assessee admits any amount against the assessed tax or penalty. The only relevant element is whether the Competent Authority has stayed the assessment or fixed installments. In that respect the Department would now be justified in not adhering to the Orders dated 22.12.2001 requiring **Dudadhar** to file a surety for Rs.50,00,000/- under the Local Act and Rs.10,00,000/- under the Central Act. Mr. Chawla has failed to disclose any stay orders or installment orders pertaining to the pending demands of sales

tax. As has been observed by the Apex Court in ***Shri Krishna*** the sweep of Section 43(5) of the DST Act should not be curtailed inasmuch as this provision prescribes that no appeal against the order of assessment with or without penalty or against an order imposing penalty shall be entertained unless such appeal is accompanied by a satisfactory proof of the payment of tax with or without penalty. In the absence of any orders envisaged in Section 43(5) the Department would be fully justified in declining to furnish statutory Declaration Forms. There are several observations to the effect that the transactions of **Dudadhar** are not bonafide; a surety previously provided has been withdrawn. Most significantly, before us it has been conceded by Mr. Chawla that **Dudadhar** is not in a position to provide additional security in the form of Bank Guarantee. Mr. Aurora has been quick to emphasise the fact that **Dudadhar** has on the one hand bought an expensive car and on the other is pleading poverty and penury. Therefore, in our opinion, there can be no wisdom in directing the Department to furnish statutory Declaration Forms exempting the payment of sales tax in circumstances where the subsequent recovery of taxes may be rendered illusory. The fundamental right to carry on a business is, no doubt, recognised in Article 19(1)(g) of the Constitution of India but it is not

protected to the extent that the business can be carried on without payment of taxes and more startling to enable a party to carry on business despite collecting indirect taxes which are not forwarded by it to the State. We say this because if Declaration Forms are to be issued by the Department to **Dudadhar** the effect could thereafter be that sales may be made to parties which either do not exist, or fail to deposit the amounts collected by them from the consumer by way of sales tax. Issuance of Declaration Forms, whether on 'C' Forms, ST-1 Forms, ST-35 or ST-35/1 Forms cannot be claimed as of right. They are provided by the Department to facilitate the collection of sales tax at the ultimate point of sale. But this does not mean that the Department must be compelled to issue them against their fundamental interests. It further appears to us that this position would remain the same regardless of whether the dealer is the seller or the purchaser.

20. We see no justification in entertaining CW 11487/2005 filed by **Dudadhar**. It would be wholly inappropriate to invoke our extraordinary powers in circumstances where serious and far-reaching disputed questions of fact exist and where there is adequate material for the Department to justify their stand in

declining to issue statutory Declaration Forms.

21. For these very reasons the Department must succeed in CW 18054/2004 and in the circumstances detailed above the impugned Order of the Appellate Tribunal, Sales Tax, dated 13.5.2004 is set aside as it may severely and irretrievably damage the prospects of collection of sales tax from **Dudadhar**. Subsequent Orders of the Appellate Tribunal, Sales Tax, dated 1.10.2004 and 14.10.2004 are also set aside.

22. **Dudadhar** shall pay costs of these Petitions to the Department, quantified at Rs.50,000/-, within four weeks from today.

23. All pending applications stand disposed of.

(VIKRAMAJIT SEN)
JUDGE

(J.P. SINGH)
JUDGE

February 26, 2007
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